

No. 91-317

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANCESCO DELORENZO AND
FELICE SESTITO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in order to protect an ongoing criminal investigation, the district court properly barred the defendants from cross-examining a government informant about the names of certain individuals who supplied him with drugs.



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-28) is unreported, but the judgment is noted at 931 F.2d 887 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1991. A petition for rehearing was denied on June 4, 1991. Pet. App. 1-2. The petition for a writ of certiorari was filed on August 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioners were convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. In addition, petitioner DeLorenzo was convicted on 12 counts, and petitioner Sestito on four counts, of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). DeLorenzo was sentenced to 69 months' imprisonment, to be followed by four years of supervised release, and was fined \$75,000. Sestito was sentenced to 63 months' imprisonment, to be followed by four years of supervised release, and was fined \$15,000. The court of appeals affirmed. Pet. App. 1-28.

1. The evidence showed that, following his arrest on drug charges, Vincent Scotto entered into a plea agreement with the government. Scotto agreed to cooperate with the government in ongoing drug trafficking investigations and to plead guilty to a two-count criminal information, in exchange for which the government agreed to inform the sentencing court of Scotto's assistance before the imposition of sentence. Pet. App. 4-5.

As part of Scotto's cooperation, he purchased cocaine from petitioner DeLorenzo on 12 occasions from October 13, 1988, to April 6, 1989. On 11 of those occasions, Scotto secretly recorded the transaction. With two exceptions, Scotto's controlled purchases followed the same basic pattern, with the actual delivery of cocaine taking place at DeLorenzo's pizzeria in Aberdeen, Maryland. Although Scotto never bought cocaine directly from petitioner Sestito, DeLorenzo told Scotto that Sestito, who owned a gas station across the street from DeLorenzo's pizzeria, was the supplier of the cocaine. Pet. App. 5-6 & n.2.

2. During pretrial discovery, the government, citing its need to withhold the identities of subjects of pending investigations, redacted from the discovery materials the names of four persons who sold drugs to Scotto while Scotto was cooperating with the government, and the times of their recorded conversations with Scotto. Two of the four were heroin suppliers and the other two were cocaine suppliers. The defense claimed that it needed the redacted information to prove that Scotto had obtained the cocaine involved in this case from one of those four sources and not from petitioners. In response to petitioners' asserted need for the redacted information, the government subsequently disclosed to petitioners the identity of one of the two previously unidentified cocaine suppliers, Thomas Barker. Pet. App. 9-10.

3. At trial, the district court refused to permit petitioners to cross-examine Scotto concerning the names of the unidentified suppliers, but otherwise afforded them wide latitude in cross-examination. Specifically, Scotto testified on cross-examination that, during the period of the alleged conspiracy, four persons sold him drugs; that two of the four sold him heroin and two cocaine; and that Thomas Barker was one of the cocaine suppliers. In addition, Scotto provided the details of his purchases of cocaine from Barker and the other unnamed cocaine supplier, and he also named five persons who had supplied him cocaine during the five years preceding the conspiracy charged in this case. Pet. App. 10.

4. On appeal, petitioners contended that they were deprived of their Sixth Amendment right of confrontation by the district court's refusal to allow them to cross-examine Scotto on the identities of the other persons who supplied him with drugs during the period of the charged conspiracy. In rejecting that

claim, the court of appeals held that, in light of the extensive questioning of Scotto allowed by the district court concerning his sources and the details of his drug transactions, the restrictions did not impede petitioners in presenting their defense. Pet. App. 9, 11-12. The court of appeals further found that the name of the one cocaine source whose identity petitioners were barred from obtaining was "irrelevant to [their] receiving a fair trial," and that the district court successfully "accomplished the dual purpose of permitting effective cross-examination while not frustrating an ongoing investigation." *Id.* at 12.

ARGUMENT

Petitioners renew their contention that the district court's limitation on their cross-examination of Scotto hindered their ability to develop "[t]he primary defense theory," which was "that the cocaine Scotto turned over to FBI agents, which he alleged came from Petitioners, was actually obtained from sources other than DeLorenzo or Sestito." Pet. 7.

1. The district court's restriction on the cross-examination of Scotto did not violate petitioners' rights under the Confrontation Clause. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). See also *United States v. Orr*, 825 F.2d 1537, 1540 (11th Cir. 1987); *United States v. Cameron*, 814 F.2d 403, 406 (7th Cir. 1987); *United States v. Ferguson*, 776 F.2d 217, 222-223 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

In this case, the district court permitted petitioners to cross-examine Scotto extensively about his sources of cocaine and other drugs; the details of his drug transactions with those sources; his opportunities to obtain drugs from those sources; and the identities of several of the sources. In addition, petitioners were allowed to question Scotto thoroughly on all matters relating to his credibility.¹ In light of the questions petitioners were permitted to ask, the court of appeals correctly concluded (Pet. App. 12) that the restriction on questions concerning the names of some of the sources did not hinder petitioners in presenting their defense that Scotto obtained cocaine from sources other than petitioners.

The names of the unidentified sources were, at most, only marginally relevant. Two of the three unidentified sources supplied Scotto with heroin rather than cocaine. Moreover, although Scotto identified Thomas Barker and five other persons who had supplied him with narcotics by name, petitioners failed to call any of those individuals as witnesses to pursue their claimed defense. In the face of that failure, and in the absence of any evidence that the cocaine came from one of the unnamed sources, petitioners' assertion that they needed the names of the three additional sources is unconvincing.

In addition, the government had a compelling interest in withholding the names of the sources in order to protect the secrecy of an ongoing investigation. In such circumstances, other courts of appeals

¹ Petitioners questioned Scotto on his plea agreement and convictions; his prior narcotics trafficking and other defenses; the seizure of weapons from his pizzeria; his loans from DeLorenzo; his personal disagreements with Sestito; and his asserted bias against petitioners. Gov't C.A. Br. 19 n.14.

have upheld similar restrictions on cross-examination against a Confrontation Clause challenge. See, e.g., *United States v. Hirst*, 668 F.2d 1180, 1183-1184 (11th Cir. 1982); *United States v. Jackson*, 756 F.2d 703, 707 (9th Cir. 1985); *United States v. Gray*, 626 F.2d 494, 499-500 (5th Cir. 1980), cert. denied, 449 U.S. 1091 (1981).

2. In any event, any error in restricting petitioners' cross-examination was harmless. The FBI agents observed and recorded 11 of the 12 purchases of cocaine involved in this case. In the case of 10 of those transactions, the agents searched Scotto to verify that he did not possess any cocaine immediately before he met with DeLorenzo in DeLorenzo's pizzeria, and they recovered the cocaine from Scotto immediately after he met with DeLorenzo. During the time that Scotto was in the pizzeria, the recording equipment with which he was outfitted was never turned off. The resulting tapes showed that Scotto discussed the purchase price and quality of the cocaine with DeLorenzo in coded terms, and that he spoke with no one else. In addition, the agents observed DeLorenzo exit his pizzeria carrying the envelope that contained the purchase money for the cocaine. Gov't C.A. Br. 15-16 n.11. In light of that evidence, there is no substance to petitioners' suggestion that further cross-examination may have given them a plausible basis for arguing that someone else supplied Scotto with the cocaine.

3. The court of appeals' decision in this case does not conflict with the Sixth Circuit's decision in *United States v. Pritchett*, 699 F.2d 317 (1983). In *Pritchett*, the court of appeals reversed the defendant's convictions for drug offenses after finding that the district court, in order to avoid compromising an

ongoing government investigation, had impermissibly limited the defendant to cross-examining the government informant about "the fact that [the informant] had other sources without disclosing whom those sources were." *Id.* at 321. In so doing, however, the *Pritchett* court relied on three circumstances not present here.

First, the court in *Pritchett* noted that the evidence that the defendant had supplied the informant with drugs was "tenuous at best" and consisted primarily of the "highly contradictory" testimony of the government's informant. 699 F.2d at 321. Second, the *Pritchett* court observed that it would have been easy "for the jury to accept the possibility that someone *other than* [the defendant] was supplying the dealers" because the third party at issue was already known to the jurors as a result of earlier testimony identifying him as one of the informant's customers for drugs. *Ibid.* Third, the court in *Pritchett* relied on the fact that disclosure of the identity of the source would not have caused any damage to the government's ongoing investigation of the source beyond that already caused by the previous testimony connecting the source by name to illegal drug activity. *Id.* at 321-322.

In this case, in contrast, Scotto's testimony implicating petitioners in drug trafficking was strongly corroborated by tape-recorded evidence and the testimony of the agents, and there was no suggestion that the names of the unidentified sources had otherwise been disclosed during the trial. Accordingly, the decision in this case does not conflict with *Pritchett*.²

² Nor are petitioners helped by *Smith v. Illinois*, 390 U.S. 129 (1968). In that case, the Court reversed a conviction because the defense was not permitted to elicit the name and

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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address of the chief prosecution witness. The Court reasoned that "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives." *Id.* at 131 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). Here, all the government's witnesses were identified and the credibility of the unidentified sources was not in issue.